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FILED
APR 14 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970
No. 1500

AMERICAN EXPORT INDUSTRIES, INC.,
Petitioner,

vs.

THE FLUOR CORPORATION, LTD.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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INDEX

PAGE

Opinions Below 1

Jurisdiction 1

Statutes and Rules Involved 2

Question Presented 2

Statement 3

Nature of Litigation 3

Arizona Litigation 5

Appellate Proceedings 6

Post Appeal Proceedings 7

Pro Tanto Assignment of Judgment 8

Registration of Judgment 9

New York District Court Opinion 9

Opinion of Court of Appeals 10

ARGUMENT 11

POINT I

The Petition Presents Neither A Federal Question Of Substance Nor A Conflict Between Circuits .. 11

POINT II

Petitioner's State Law Contentions Are Inappropriate For Consideration By This Court 17

CONCLUSION 19

TABLE OF AUTHORITIES

PAGE

CASES:

James Blackstone Memorial Assn. v. *Gulf, Mobile & Ohio R. R.*, 28 F. R. D. 385, 388 (D. Conn. 1961) 15

Butcher & Sherrerd v. *Welsh*, 206 F. 2d 259 (3rd Cir. 1953) 8

Elgin National Watch Co. v. *Barrett*, 213 F. 2d 766 (5th Cir. 1954) 15

Eno v. *Crooke*, 10 N. Y. 60, 66-7 (1854) 18

Gagnon v. *United States*, 193 U. S. 451 (1904) ... 7

Hadden v. *Rumsey Prods.*, 196 F. 2d 92, 95 (2d Cir. 1952) 10

Herpe v. *Herpe*, 225 N. Y. 323, 122 N. E. 204 (1919) 8

Lapin v. *Shulton, Inc.*, 333 F. 2d 169 (9th Cir. 1964) 13

Mosher v. *Conway*, 45 Ariz. 463, 46 P. 2d 110 (1935) 18

Providential Development Company v. *United States Steel Company*, 236 F. 2d 277, 281 (10th Cir. 1956) 15

Smith v. *National Surety Co.*, 28 Misc. 628, 59 N. Y. S. 789, *aff'd*, 46 App. Div. 633, 62 N. Y. S. 1105 (1899) 18

Stanford v. *Utley*, 341 F. 2d 265 (1965) 16

Torquay Corporation v. *Radio Corporation of America*, (S. D. N. Y. 1932) 2 F. Supp. 841 ... 14

Townsend v. *Whitney*, 75 N. Y. 425, 429-30 (1878) 18

Wetmore v. *Carrick*, 205 U. S. 141 (1907) 8

Winfield Associates, Inc. v. *Stonecipher*, 429 F. 2d 1087 (10th Cir. 1970) 14

PAGE

STATUTES:

28 U. S. C. § 1963 .....2, 12, 18

40 U. S. C. § 270 (a) 5

40 U. S. C. § 270 (b) (65a) 6

§ 12-1643 (a) Arizona Revised Statutes 18

RULES:

60 (b) Federal Rules of Civil Procedure 13, 14, 15 16, 17, 18

60 (b) (5) Federal Rules of Civil Procedure ...2, 9, 11

TEXTS:

7 Moore's Federal Practice, ¶ 60.19, p. 223 12

7 Moore's Federal Practice ¶ 60.28 28[2] p. 316 .. 13

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October Term, 1970

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AMERICAN EXPORT INDUSTRIES, INC.,
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vs.

THE FLUOR CORPORATION, LTD.,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Opinions Below

The opinion of the District Court for the Southern District of New York (App. A of Petition, pp. 6a-8a) is not officially reported. The opinion of the Court of Appeals for the Second Circuit (App. A of Petition, pp. 1a-5a) is not yet reported.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Statutes and Rules Involved

The pertinent statutes and rules involved are Rule 60 (b) (5) of the Federal Rules of Civil Procedure and 28 U. S. C. § 1963 which are set forth in the Petition at pp. 5 and 6.

Question Presented

By its judgment the Court below affirmed an order of the District Court for the Southern District of New York denying a motion of petitioner, American Export Industries, Inc. (AEI), filed pursuant to Rule 60 (b) (5) of the Federal Rules of Civil Procedure which sought (1) to vacate a judgment rendered by the District Court for the District of Arizona and registered in the Southern District of New York pursuant to 28 U. S. C. § 1963; and (2) to restrain respondent, The Fluor Corporation, Ltd. (Fluor) as assignee from enforcing the judgment through writ of execution and levy upon petitioner's property.

The motion was denied without prejudice to AEI's right to seek a comparable remedy in the Arizona District Court on the ground that "resolution of the motion can most readily and quickly be decided by the Arizona Court which is most familiar with the entire litigation" (App. A to Petition, p. 8a). Enforcement of the registered judgment was stayed for 15 days in order to afford petitioner adequate time to move for appropriate relief in Arizona. AEI nevertheless refused to apply to the Arizona District Court, electing instead to appeal to the Court below. In our view the judgment of the Court of Appeals in affirming the order of the District Court presents only one question:

> Whether, in view of the long and complicated history of proceedings before the Arizona District Court, the Court below erred in concluding that the

New York District Court "acted well within its discretion" in denying AEI's Rule 60 (b) (5) motion to vacate the registered judgment without prejudice to petitioner's right to apply for identical or other relief before the Arizona District Court "which is most familiar with the litigation."

Statement

The complicated history of this litigation is delineated in the findings of fact and conclusions of law entered by the Arizona District Court (100a-123a) and in the opinion of the United States Court of Appeals for the Ninth Circuit (56a-69a) reported at 405 F. 2d 823. We endeavor to summarize that history below.

Nature of Litigation

This litigation arose out of construction performed for the United States Government on the Titan II missile launch facilities erected at Davis Monthan Air Force Base, Tucson, Arizona. In 1961 Fluor entered into a prime contract with the United States Government Army Corps of Engineers for the completion of Phase II work on the Davis Monthan project. Fluor then entered into a first-tier subcontract with the Graver Division of Union Tank Car Company (Union) which subcontract covered the steel fabrication and erection included in Fluor's prime contract with the government. Union's Graver Division in turn entered into a second-tier subcontract with IMI-Ward, a joint venture composed of Idaho-Maryland Industries, Inc. (IMI) and Ward Industries Corporation (the latter being the corporate predecessor of AEI) which subcontract covered a substantial portion of the steel fabrication included in Graver's first-tier subcontract with Fluor (57a-58a).

When IMI-Ward fell behind the work schedule on the project, Graver insisted that IMI-Ward subcontract a portion of its steel fabrication work to other materialmen and in this connection approved IMI-Ward's selection of Mosher Steel Company (Mosher) as a qualified fabricator. On November 3, 1961 IMI-Ward entered into a contract with Mosher by issuing purchase orders pursuant to which Mosher fabricated and delivered the steel covered in the orders (110a-120a). Fluor paid Graver for this work pursuant to its first-tier subcontract. Graver in turn paid IMI-Ward pursuant to its second-tier subcontract by making payment to the California National Bank to which IMI-Ward had assigned its invoices in a security financing transaction (117a).

The project was of an emergency nature. Mosher proceeded on a rush basis to fabricate and to deliver the steel but failed to submit invoices for payment in proper form to IMI-Ward until January 19, 1962 (117a). IMI-Ward in the interim was proceeding with its subcontract and was billing and received payment on the basis of percentage of work completed which work included Mosher's fabricated steel. By the end of January, 1962 Mosher had fabricated and delivered most of the steel called for by the IMI-Ward purchase orders but had received no payment from the joint venture when on February 2, 1962 IMI filed a petition under Chapter XI of the Bankruptcy Act (118a).

Ward thereupon abandoned the second-tier subcontract and its joint venturer IMI although the IMI-Ward joint venture agreement provided ". . . that the obligation of the joint venture under this subcontract with Union . . . shall be joint and several . . ." (104a). Moreover, Union's Graver Division refused to pay Mosher, because it had no contract with Mosher and in any event had already overpaid IMI-Ward (93a). As a result Mosher, although it fully performed the purchase orders, went unpaid, while

IMI-Ward, although it defaulted in its express contractual obligation to pay Mosher, received payment for the steel which Mosher had fabricated and furnished for the project.

Arizona Litigation

In January, 1963 Mosher brought suit in the Arizona District Court against Fluor and its Miller Act bonding companies, and against Ward and Union in order to recover the contract price provided in the IMI-Ward purchase orders.

After protracted discovery and trial proceedings, the Arizona District Court on May 24, 1966 entered findings of fact and conclusions of law and directed the entry of a joint and several judgment against Ward and Union in the amount of $268,822.92 (123a) based on its conclusion that both Ward and Union were directly obligated to pay Mosher.

The Arizona District Court on the same date further directed the entry of a separate joint and several judgment in the amount of $246,165.96 against Fluor and the bonding company co-defendants, based solely upon Fluor's obligation under a payment bond posted pursuant to the Miller Act, 40 U. S. C. § 270(a), for the protection of persons supplying labor and material in the prosecution of the work. This judgment did not include $22,716.96 that Mosher recovered from Ward and Union for steel delivered to another project in which Fluor was not involved. Such Miller Act liability was imposed despite the fact that Fluor had no express or implied contract with Mosher whatsoever and had already paid for the work. Its liability resulted exclusively from IMI-Ward's failure to pay Mosher for the steel required to complete its second-tier subcontract with Union and from Union's breach of a promise to pay Mosher direct if IMI-Ward failed to do so. The Arizona trial court found that the latter promise was a "direct con-

tractual relationship" under the Miller Act (120a). In the absence of this finding, Fluor would, of course, not have been liable.

Appellate Proceedings

Appeals were subsequently taken to the United States Court of Appeals for the Ninth Circuit. In connection with these appeals Fluor, alone among the defendants, posted a supersedeas bond to stay enforcement of the judgment. On January 6, 1969 the Court of Appeals for the Ninth Circuit affirmed the judgments against all defendants and remanded the cause to the District Court on Mosher's cross-appeal for the calculation and award of pre-judgment interest. In summarizing its decision with respect to Union and IMI-Ward, the Court of Appeals declared (61a):

> "... *the court determined that both Union and IMI-Ward assumed direct liability to pay Mosher for the work. IMI-Ward contracted directly with Mosher to have Mosher perform the work* described in the November 3 work orders in return for payment by IMI-Ward of the prices fixed in those orders. This agreement was subject, however, to the condition precedent that Union also agree to be directly liable for payment. When Union agreed to pay Mosher, it became directly bound to Mosher. Union's promise also satisfied the condition precedent to the direct contractual obligations between IMI-Ward and Mosher." (Emphasis supplied)

The Court of Appeals further concurred in the District Court's conclusion that Union's promise to pay, if IMI-Ward did not, put Mosher in the position of a person "having a direct contractual relationship with a subcontractor" of Fluor within the meaning of 40 U. S. C. § 270(b) (65a).

Post Appeal Proceedings

Following denial of defendants' certiorari petitions on May 5, 1969 (394 U. S. 1014), Fluor found itself in the vulnerable position of being the only defendant against which Mosher could readily levy. Fluor had posted a supersedeas bond while Ward and Union had no assets within the Arizona District. Fluor therefore filed a motion in the Arizona District Court for an order granting leave to file a cross-claim against AEI and Union and for indemnity (125a-126a).

This motion was opposed exclusively on jurisdictional grounds. AEI took the position that the Arizona District Court had lost jurisdiction to entertain a cross-claim and to seek indemnity in the action after the final judgment had been affirmed by the Court of Appeals and certiorari had been denied by this Court. It also asserted that AEI was no longer subject to suit in Arizona and that a cross-claim could not be entertained on the theory of ancillary jurisdiction (95a).

In opposing the motion AEI declared that it was:

> ". . . appearing, specially upon this motion by The Fluor Corporation, Ltd. ('Fluor') *solely and only* for the purpose of recording its objection (1) to the jursidiction of this Court over the subject matter of Fluor's motion and alleged cross-claim and (2) to the jurisdiction of this Court over the person of Ward." (Emphasis supplied)

AEI also cited authorities to the effect that after a final judgment was affirmed on appeal, the District Court was powerless to entertain further proceedings and its jurisdiction was limited to compliance with the mandate of the Court of Appeals. *Gagnon* v. *United States,* 193 U. S.

451 (1904); *Wetmore* v. *Carrick,* 205 U. S. 141 (1907); *Herpe* v. *Herpe,* 225 N. Y. 323, 122 N. E. 204 (1919); *Butcher & Sherrerd* v. *Welsh,* 206 F. 2d 259 (3rd Cir. 1953).

The District Court subsequently denied Fluor's motion without opinion or comment.

Pro Tanto Assignment of Judgment

With the case in this posture, Fluor on September 8, 1969 paid Mosher $297,788.90, representing the amount of the $246,165.96 separate judgment against Fluor and the bonding companies, plus costs and statutory interest. In return Fluor received a pro tanto assignment of the larger judgment against Ward and Union (to which Fluor was not a party) and a discharge of Fluor's supersedeas and Miller Act bonds. Because of its Miller Act bond, Fluor was forced to make this payment despite the fact that it had already paid once for the work Mosher performed. The assignment (79a-81a) was embodied in a stipulation filed of record and approved by order of the Arizona District Court on September 12, 1969 (124a). The assignment provided (80a):

> "In consideration of such payment, Mosher Steel Company assigns to The Fluor Corporation Ltd., pro tanto to the extent of $297,788.90, all of its right, title and interest in and to the judgment rendered in its favor on May 24, 1966 against all of the defendants in this action and agrees that The Fluor Corporation, Ltd., shall be entitled to the extent of such payment, to plaintiff's rights in said judgment including, without limitation, the right to register said judgment pursuant to 28 U. S. C. A. § 1963 in any other federal jurisdiction . . ."

Registration of Judgment

Fluor obtained a certification of judgment and of the assignment of judgment from the Clerk of the Arizona District Court which it subsequently registered with the Clerk of the United States District Court for the Southern District of New York on March 13, 1970 (12a-13a) pursuant to the provisions of 28 U. S. C. § 1963. Writ of execution was duly issued on the registered judgment and levies made on March 31, 1970 upon AEI's funds held at the First National City Bank and the Chemical Bank and Trust Company of New York (83a-85a-88a).

Following execution and levy, AEI on April 3, 1970 obtained a rule to show cause why an order should not be entered vacating the registered judgment pursuant to FRCP Rule 60 (b) (5) on the ground that the judgment had been paid and discharged as to AEI. It further obtained an order restraining the United States Marshal from proceeding with the levy upon AEI's funds pending disposition of the rule to show cause (14a-17a).

The matter thereafter was heard by the New York District Court on attorneys' affidavits with various exhibits attached constituting only portions of the record of proceedings in the Arizona District Court. Numerous fact disputes appeared in the affidavits concerning the actual course of events in the Arizona Court.

New York District Court Opinion

Following briefing and oral argument, and based on the foregoing record, the New York District Court for the Southern District of New York rendered its opinion on June 19, 1970 denying AEI's motion for relief under FRCP Rule 60 (b) (5). The Court observed that as a preliminary matter it was faced with the question whether such a motion to vacate the judgment must not be made before the court

where judgment was originally entered, citing among other authorities the Second Circuit's decision in *Hadden v. Rumsey Prods.*, 196 F. 2d 92, 95 (2d Cir. 1952) where the question was raised but not resolved. The District Court nevertheless was of the opinion "that under certain circumstances such a motion may be entertained by the court in which a judgment is registered, but I do not find such circumstances to exist in this matter" (App. A to Petition, p. 7a).

The District Court then reviewed the conflicting contensions of the parties and noted that only parts of the long and complicated Arizona record were before it. The Court concluded (App. A to Petition, p. 8a):

> "The relationships between Fluor and AEI are crucial to the determination of this motion. The resolution of the issues can most readily and quickly be determined by the Arizona court which is most familiar with the entire litigation. This is especially true since Fluor has raised questions of applicable Arizona law. This court cannot determine the issues on the basis of the papers presented to it."

While denying the motion on the foregoing grounds the Court nevertheless ordered that "[a]ny execution and levy issued for the enforcement of the judgment is stayed for a period of fifteen days to afford AEI time to move for appropriate relief in the United States District Court for the District of Arizona" (App. A to Petition, p. 8a).

Opinion of Court of Appeals

On December 24, 1970, the order of the New York District Court was affirmed by the Court below. It concluded that the District Court had "acted well within its

discretion" in denying AEI's motion without prejudice to petitioner's right to proceed in the Arizona District. The Court of Appeals declared (App. A to Petition, p. 4a):

> "Few would argue . . . that the court of registration lacks discretion in appropriate circumstances to refer the parties to the court which rendered judgment . . . Here, AEI's motion for relief under Rule 60(b)(5) raised virtually the same issues in the Southern District Court of New York as the District Court of Arizona had already considered in Fluor's post-judgment motion. Comity among the district courts would obviously be further if these issues were referred back to the court which originally considered them. Moreover, because the Arizona court was already familiar with the issues, the interests of efficient judicial administration commend that court as an eminently suitable forum for further related proceedings."

ARGUMENT

I

THE PETITION PRESENTS NEITHER A FEDERAL QUESTION OF SUBSTANCE NOR A CONFLICT BETWEEN CIRCUITS

The simple and sole issue presented by this case is whether the Court below erred in concluding that the New York District Court acted within its discretion in denying a Rule 60 (b) (5) motion to vacate the registered judgment, without prejudice to petitioner's right to renew its motion before the Arizona District Court which had rendered the judgment and which was "most familiar with the litigation". This ruling clearly presents no federal question of

substance. Nor does it give rise to a conflict with the decisions of any other Circuit. On the contrary, the ruling follows the uncontradicted authority on the issue and represents a laudatory effort to promote judicial economy, thereby serving the purpose of 28 U. S. C. § 1963.

The District Court was presented with a Rule 60(b)(5) motion which would have required it to thoroughly familiarize itself with a highly complex fact situation involving four tiers of subcontractors which had been the subject of seven years of litigation twice reaching the Ninth Circuit Court of Appeals. The Court reasoned that the Arizona District which tried the case and was fully familiar with all its intricacies could "most readly and quickly" decide the issues, particularly since substantial questions of Arizona law were presented. In so deciding, the Court was quite properly exercising the discretion granted it under Rule 60(b). The Rule itself specifically states that a district court "may" on motion relieve a party from a final judgment. The authorities are unanimous that a district court's action pursuant to Rule 60(b) "involves a discretionary appraisal of the facts of the particular case and the relief, if any, to be granted: this matter, then, is largely within the judicial discretion of the trial court." *7 Moore's Fed. Prac.* ¶ 60.19, p. 223 and cases cited therein.

The discretionary nature of a court's role under Rule 60(b) is not altered merely because the judgment from which movant seeks relief is a registered judgment under 28. U. S. C. § 1963. Indeed, the fact that the judgment attacked is a registered judgment adds a further dimension to a court's discretion, for a court has the discretionary power to decline to entertain such a motion:

> "In some instances the court of registration will be a sufficiently convenient forum that it should entertain a motion under 60(b). In others, it should,

> in the exercise of a sound discretion, decline to entertain the motion on the theory that the forum where the judgment was originally rendered is a more convenient and satisfactory forum." *7 Moore's Fed. Prac.* ¶ 60.28 28[2] p. 316.

Thus, in denying the motion because it felt the rendering court was a more convenient and satisfactory forum, the District Court was, as the Court below held, acting "well within its discretion," discretion established by an uncontradicted line of authority.

In *Lapin* v. *Shulton, Inc.*, 333 F. 2d 169 (9th Cir. 1964) the Court considered the meaning of Rule 60 (b) in an action filed in the District Court for the Southern District of California seeking to dissolve an injunction issued by the District Court for the District of Minnesota. The California District Court denied the application on discretionary considerations not unlike those present here. In affirming, the Ninth Circuit held that Rule 60 (b) did not deprive all other courts of jurisdiction but that considerations of comity may make it appropriate for the court of registration to decline to entertain the motion. It declared (p. 172):

> "We need not go so far as to hold that these considerations and interpretation of Rule 60(b) deprive all courts other than the issuing court of jurisdiction in such a case as this. We do hold that considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there.
>
> "In this respect we approve the decision and language of the District Court for the Southern

District of New York in *Torquay Corporation* v. *Radio Corporation of America* (S. D. N. Y. 1932) 2 F. Supp. 841.

* * *

"The District Court declined relief, stating, 2 F. Supp. at page 844.

'Assuming for the moment that this court has jurisdiction of the present suit, it is clear, as a matter of comity and of the orderly administration of justice that this court should refuse to exercise its jurisdiction to interfere with the operation of a decree of another federal court . . . [C]omplainant's rights, if any, would seem to be more properly justiciable in the court that made the decree, out of which complainant's grievance arises, than here.' "

The Tenth Circuit in *Winfield Associates, Inc.* v. *Stonecipher,* 429 F. 2d 1087 (10th Cir. 1970) recently reached a similar conclusion in an action seeking relief from a registered judgment. There a default judgment has been entered in the District Court for the Northern District of Illinois and registered in the District Court for the District of Kansas. Following registration defendant filed a Rule 60 (b) motion in the Kansas District Court seeking relief from the judgment despite the fact that he had bypassed legal remedies available to him in the District Court which rendered the judgment. The Kansas District Court denied relief both under Rule 60 (b) and in treating the motion as an independent equitable action. On appeal the Tenth Circuit held that the determination of the District Court would not be disturbed in the absence of a clear abuse of discretion. It declared (p. 1090):

> ". . . Although appellant now contends on appeal that Rule 60(b) imposes on the trial court the power to grant relief from the judgments entered in other United States District Courts, he ignores the point that relief under Rule 60(b) is addressed to the sound discretion of the court. Appellant has made no attempt to show an abuse of discretion. On the contrary, it appears that central to the trial judge's exercise of discretion is the fact that appellant deliberately bypassed his legal remedies of appeal from the default judgment and from the rendering court's order denying relief from the judgment."

Compare *James Blackstone Memorial Assn.* v. *Gulf, Mobile & Ohio R. R.*, 28 F. R. D. 385, 388 (D. Conn. 1961) where the court of registration also denied defendant's Rule 60(b) motion but "without prejudice to any rights of petitioner to seek clarification in the court where the original judgment was rendered." See also *Providential Development Company* v. *United States Steel Company*, 236 F. 2d 277, 281 (10th Cir. 1956); *Elgin National Watch Co.* v. *Barrett*, 213 F. 2d 766 (5th Cir. 1954).

In our view the foregoing decisions are persuasive authority supporting the conclusion of the Courts below that the relief demanded by AEI might more appropriately be sought in the Arizona District Court. Comparable discretionary considerations, when viewed in light of the long and involved history of this litigation, emphasize the sound reasoning exercised by the Courts below in reaching their decisions.

Petitioner is unable to cite a single authority contrary to those which support the court of registration's right to deny a Rule 60 (b) motion when that court is of the opinion that the rendering court is a more convenient forum to hear the motion. Instead, petitioner relies on an assortment of

unrelated and totally irrelevant decisions in a vain attempt to construct a theory that the court of registration must, as a matter of law, entertain on the merits every Rule 60 (b) motion. Even a cursory examination of the so-called authorities cited reveals no such rule of law. It certainly does not follow, as petitioner argues, that because a registered judgment becomes, *for purposes of enforcement,* a judgment of the court of registration, that therefore the court of registration is powerless to deny a Rule 60(b) motion and suggest that judicial economy will be better served if the rendering court decides the motion. Even in *Stanford* v. *Utley,* 341 F. 2d 265 (8th Cir. 1965), the cornerstone of petitioner's argument, the Court stated (p. 271):

> "The presence of these and undoubtedly many other questions prompts us to emphasize that the conclusion we reach here is one having application to the fact situation of this case. *We do not now go so far as to say that registration effects a new judgment in the registration court for every conceivable purpose*; . . ." (Emphasis supplied)

Petitioner's further arguments concerning *forum non convenience* and § 1404(a) miss the point. The Court below did not rest its decision on either of these; rather it held that the court of registration has discretion to deny a Rule 60(b) motion on the ground that the motion is more conveniently and properly presented to the rendering court and, specifically, that the District Court here acted well within the limits of that discretion. The Court's analogy to *forum non convenience* was merely illustrative of the general principal that courts have the discretion to refer to more convenient forums.

Petitioner's arguments thus reduce to the proposition that AEI should not be put to the trouble of travelling to

Arizona in order to apply for relief. Petitioner neglects to mention, however, that Fluor has been forced to come to New York only because AEI fled the jurisdiction of Arizona where it had for years been qualified to transact business and had defaulted on a multi-million dollar contract, leaving no assets against which the ultimate judgment rendered in favor of Mosher could be enforced. In any case, this Court should not be required to expend its energy on issues involving a mere balancing of conveniences between parties.

In summary, the District Court and the Court below acted within the limits of a well-established and uncontradicted line of authority in ruling that a court of registration may deny a Rule 60(b) motion without prejudice to movant's rights to renew the motion in the rendering court. The rulings prevent discord among the various district courts, promote judicial economy, and at the same time grant a Rule 60(b) movant his right to be heard. Given these facts, it is clear that this petition does not raise any question requiring clarification by, or the attention of this Court. Moreover, it most certainly presents no conflict in decisions of Courts of Appeal.

II

Petitioner's State Law Contentions Are Inappropriate For Consideration By This Court

Petitioner argues at length that under New York law payment by one of several joint judgment debtors "automatically" satisfies the judgment (Pet. pp. 16-19). This is so in some cases, but not under the circumstances present here.

Next, petitioner asserts without the support of any authority, that a paying judgment debtor has "no power" to

register a judgment under 28 U. S. C. § 1963 (Pet. pp. 20-21).

Neither point was the basis of the decision of the trial court, which deemed that the complicated question of the relationship between the parties and the significance of its own judgment were better left to the Arizona court, which was most familiar with the entire litigation. No discussion is required to establish that this Court does not sit nor grant writs of certiorari to resolve disputed questions of state law not even reached in the decision of the Courts below.

Respondent argued below that petitioner's claim that payment by one judgment debtor discharges co-judgment debtors, ignores the principle that a judgment is not extinguished when the payment judgment debtor is not primarily, but only secondarily liable. Under both Arizona and New York law a surety-assignee without question is entitled to seek to recover against a co-judgment debtor who is primarily liable on the judgment. *Townsend* v. *Whitney*, 75 N. Y. 425, 429-30 (1878); *Eno* v. *Crooke*, 10 N. Y. 60, 66-7 (1854); *Smith* v. *Nat. Surety Co.*, 28 Misc. 628, 59 N. Y. S. 789, *aff'd*, 46 App. Div. 633, 62 N. Y. S. 1105 (1899); see *Mosher* v. *Conway*, 45 Ariz. 463, 46 P. 2d 110 (1935); *Ariz. Rev. Stat.*, § 12-1643 (A).

In any event, whether petitioner or respondent is correct as to its understanding of applicable local law in the context of this case, is irrelevant for purposes of determining whether AEI's petition for a writ of certiorari should be granted. What is relevant is that the Court below decided no question of local law in affirming dismissal of AEI's Rule 60 (b) motion without prejudice to its renewal in the Arizona District Court. It is our understanding that this Court has never granted certiorari merely to unravel unresolved questions of state law best left for consideration by a District Court in the first instance. It should not do so now.

Conclusion

For the foregoing reasons, respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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